Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–19 OF 2006(J)
AHMAD FAIRUZ CHIEF JUSTICE, ALAUDDIN AND AUGUSTINE PAUL FCJJ
22 SEPTEMBER 2006

Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Procedures for making representation — Breach of r 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 — Whether such breach subject to judicial review

Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Procedures for making representation — Duties of officer in charge — Whether reference to officer in charge includes a reference to any person lawfully exercising functions of that office — Whether person lawfully exercising functions of officer in charge should tender evidence of right to act in such capacity — Whether failure to tender such evidence would constitute a breach of r 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987

The respondent was detained for a period of two years pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). He filed a writ of habeas corpus in the High Court seeking his release. In the High Court, counsel for the applicant contended that there was no evidence on record to show that one Sazali bin Ismail ('Sazali') — the person who carried out certain required functions under r 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') was the officer in charge as specified in the said Rules. The High Court inter alia held that the failure to establish Sazali as the officer in charge who executed the functions under r 3, was a procedural failure that warranted the release of the applicant. The respondents appealed to the Federal Court.

Held, allowing the appeal:

(1) The fact that the duty to carry out the functions in the rules is entrusted to the officer in charge is no doubt of importance. The purpose is to ensure that they are carried out properly and promptly. However, there is no qualification in r 3(2), (3) and (4) requiring the officer in charge to carry out the duties personally (see para 6).

(2) Reading the Rules together with s 7 of the Interpretation Act 1967, a reference to the officer in charge in r 3(2), (3) and (4) would include a person who is lawfully exercising the functions of that office. However, where the functions are carried out by someone else he must tender in evidence his right to act in that capacity. A failure to do so will no doubt lead to a breach of the requirements of r 3(2), (3) and (4). In this case there was no evidence to show that Sazali was the person lawfully holding, acting in or exercising the functions of the officer in charge. There was therefore a breach of r 3(2), (3) and (4) to that extent (see para 7).

(3) The more crucial aspect of r 3(2), (3) and (4) is the performance of the duties required by the rules. That cannot be said of the person who is required to communicate the information to the detainee. The fact that it has been done by a person who is not the officer in charge will have no bearing on the conduct of the hearing by the Advisory Board (see para 9).

(4) Section 9(2) of the Act only provides that for the purpose of enabling a person to make representation he shall be informed of that right. It does not say that the communication must be made by any specified officer. Thus, the fact that the requirements of r 3(2), (3) and (4) were performed by a person who is not the officer in charge does not invalidate the act done (see para 10).

(5) In the instant case, the fact that the duties specified in r 3(2), (3) and (4) had not been carried out by the officer in charge, though a breach, would not affect the hearing before the Advisory Board and, consequently, was not one that would govern the exercise of discretion by the Yang di-Pertuan Agong in making a decision on the recommendation of the Advisory Board. It was therefore not one that was subject to judicial review within the meaning of s 11C of the Act (see para 11).

[Bahasa Malaysia summary

Responden telah ditahan selama dua tahun menurut s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut'). Beliau telah memfailkan satu writ habeas corpus di Mahkamah Tinggi memohon pembebasannya. Di Mahkamah Tinggi, peguam bagi pihak pemohon menegaskan bahawa tiada keterangan atas rekod yang menunjukkan bahawa Sazali bin Ismail ('Sazali') — orang yang telah melaksanakan fungsi tertentu yang dikehendaki dilakukan di bawah k 3 Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987 ('Kaedah tersebut') adalah pegawai bertugas seperti yang dinyatakan dalam Kaedah tersebut. Mahkamah Tinggi, antara lain, memutuskan bahawa kegagalan untuk membuktikan Sazali sebagai seorang pegawai bertugas yang melaksanakan fungsi-fungsi di bawah k 3, merupakan satu kegagalan prosedur yang mewajarkan pembebasan pemohon. Responden-responden telah merayu ke Mahkamah Persekutuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakikat bahawa tugas untuk melaksanakan fungsi-fungsi dalam kaedah

tersebut yang diamanahkan kepada pegawai bertugas tidak diragui kepentingannya. Tujuannya adalah untuk memastikan bahawa ia dilaksanakan dengan betul dan segera. Namun, tiada syarat dalam k 3(2), (3) dan (4) yang menghendaki pegawai bertugas melaksanakan tugas tersebut dengan sendiri (lihat perenggan 6).

(2) Setelah membaca Kaedah tersebut bersama dengan s 7 Akta Tafsiran 1948 dan 1967, rujukan kepada pegawai bertugas dalam k 3(2), (3) dan (4) termasuklah seseorang yang sah melaksanakan fungsi jawatan tersebut. Namun, di mana fungsi tersebut dilaksanakan oleh orang lain beliau hendaklah menenderkan dalam keterangan hak beliau bertindak dalam kapasiti tersebut. Kegagalan untuk berbuat demikian akan mengakibatkan pelanggaran keperluan k 3(2), (3) dan (4). Dalam kes ini tiada keterangan menunjukkan bahawa Sazali adalah orang yang sah memegang, bertindak atau melaksanakan fungsi pegawai bertugas. Oleh itu terdapat pelanggaran k 3(2), (3) dan (4) (lihat perenggan 7).

(3) Aspek penting k 3(2), (3) dan (4) adalah pelaksanaan tugas-tugas yang dikehendaki oleh Kaedah tersebut. Tidak boleh dikatakan seseorang yang dikehendaki untuk menyampaikan maklumat itu kepada orang tahanan. Hakikat bahawa ia telah dilaksanakan oleh seseorang yang bukanlah pegawai bertugas tiada kesanya terhadap pengendalian perbicaraan oleh Lembaga Penasihat (lihat perenggan 9).

(4) Seksyen 9(2) Akta tersebut hanya memperuntukkan bahawa bagi tujuan membolehkan seseorang itu membuat representasi beliau hendaklah dimaklumkan tentang hak tersebut. Tidak dinyatakan bahawa komunikasi telah dibuat oleh mana-mana pegawai tertentu. Oleh itu, hakikat bahawa keperluan k 3(2), (3) dan (4) dilaksanakan oleh seseorang yang bukan pegawai bertugas tidak menjadikan tindakan yang dilakukan itu tidak sah (lihat perenggan 10).

(5) Dalam kes semasa, hakikat bahawa tugas-tugas yang dinyatakan dalam k 3(2), (3) dan (4) tidak dilaksanakan oleh pegawai bertugas, meskipun satu pelanggaran, tidak akan menjejaskan perbicaraan di hadapan Lembaga Penasihat dan, berikutan itu, bukan suatu yang mengawal penggunaan budi bicara oleh Yang di-Pertuan Agong dala membuat satu keputusan atas nasihat Lembaga Penasihat. Oleh itu ia bukan suatu yang tertakluk kepada kajian semula kehakiman dalam maksud s 11C Akta tersebut (lihat perenggan 11).]

Notes

For cases on detention under Dangerous Drugs (Special Preventive Measures) Act 1985, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1299–1302.

Cases referred to

Abdul Ghani bin Jusoh & Anor v PP [1981] 1 MLJ 25 (refd)

District Board Kheri v Abdul Majid Khan AIR 1930 Oudh 434 (refd)

Howard v Bodington (1876) 2 PD 203 (refd)

Muhammad Jailani bin Kasim v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403 (refd)

Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 3 MLJ 28 (refd)

Wong Kiew Meow v Timbalan Menteri Dalam Negeri, Malaysia dan satu lagi [1994] 1 MLJ 714 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 r 3(2), (3), (4)
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(1), 9(2), 11C
Interpretation Acts 1948 and 1967 s 7

Tengku Amir Zaki bin Tengku Hj Abdul Rahman (Najib Zakaria with him) (Deputy Puclic Prosecutors, Attorney General's Chambers) for the appellant.
RR Mahendran (Gobind Singh Deo with him) (RR Mahendran & Co) for the respondents.

Augustine Paul FCJ (delivering judgment of the court):

[1] This appeal was heard together with Federal Court Criminal Appeals No 05–18–2006 (J) and 05–21–2006 (J) as they involved a common question of law. The issue for determination is the effect of an act done by a person when he is not the holder of the office who is required by law to do the act in question.

[2] The detainee was detained for a period of two years with effect from 18 December 2004 pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). He filed a writ of habeas corpus in the High Court seeking his release. At the hearing of the writ learned counsel based his argument on only one point in reliance on r 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 which reads as follows:

> 3 (1) When any person is served with a detention order, the police officer serving the detention order shall at the same time –
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> (a) inform that person of his right to make representations against the detention order; and
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> (b) provide him with three copies of Form I prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.
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> (2) A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I duly signed by him to the Secretary through the officer in charge of the Police District where the detention order was served or the officer in charge of the place of detention.
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> (3) When a detained person is brought to a place of detention, the officer in charge shall as soon as practicable remind the person of his right to make representations.
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> (4) The officer in charge of the Police District where the detention order was served or the officer in charge, as the case may be, who receives any written representation in Form I shall forthwith forward such representation to the Secretary.
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> (5) Where a detained person refuses to accept service of any document to be served on him under the Act or these rules, the officer in charge of the Police District where the detention order is served shall forthwith inform the Secretary of such refusal and it shall be presumed that the detained person is not making any representation against his order of detention.
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> (6) A detained person who refuses to accept service of any document at the time when he was served with the detention order may request the officer in charge to serve Form I on

him, and the officer in charge shall on such request being made, serve three copies of Form I on the detained person and inform the Secretary of such service.

[3] In this case, the officer who carried out the duties under r 3(2), (3) and (4) was one Sazali bin Ismail. He was a Superintendent at Pusat Pemulihan Akhlak, Muar, Johor. Learned counsel contended in the High Court that there was no evidence on record to show that Sazali bin Ismail was the officer in charge as specified in the said rules. In his reply, the learned Deputy Public Prosecutor said that it can be assumed that he was the officer in charge. In support of his contention, he referred to *Wong Kiew Meow v Timbalan Menteri Dalam Negeri, Malaysia dan satu lagi* [1994] 1 MLJ 714. In upholding the objection raised, the learned judge of the High Court said in his grounds of judgment:

> It might not be that obvious, but r 3 requires specific officers to carry out specific tasks. The officer to inform the person of his right to make representations against the detention order and to provide that person with 3 copies of Form I (see *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28) and obtain an acknowledgement of the receipt thereof, is the police officer serving the detention order (sub-r 3(1)). When a detained person is brought to a place of detention, the officer to remind that person of his right to make representations is the officer in charge of the place of detention. A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I to the Secretary of the Advisory Board through the officer in charge of the Police District where the detention order was served or the officer in charge of the place of detention. The officer to forward the representation is the officer in charge of the Police District where the detention order was served or the officer in charge of the place of detention..
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> But alas, there is no evidence for (sic) to find that it was the officer in charge of the place of detention who had carried out the designated task. The officer who reminded Balamurugan a/l Gopalan of his right under r 3(2) and who forwarded the representation to the Advisory Board was one Delber Singh a/l Sadhu Singh who affirmed (see enclosure 16–44–30–05) that he was a Senior Deputy Superintendent at the place of detention (Batu Gajah). The officer who reminded Ong Beng Chuan of his right under r 3(2) and who forwarded the representation to the Advisory Board was one Sazali bin Ismail Azman who affirmed (see enclosure 15–44–32–05) that he was a Superintendent at the place of detention (Muar). The officer who reminded Chai Wi Su of his right under r 3(2) and who forwarded the representation to the Advisory Board was one Azman bin Mohd Ali who affirmed (see enclosure 18–44–33–05) that he was a Senior Superintendent at the place of detention (Muar). And the officer who reminded Eng Chee Keong of his right under r 3(2) and who forwarded the representation to the Advisory Board was one Azman bin Mohd Ali who affirmed (see enclosure 17–44–37–05) that he was a Deputy Superintendent at the place of detention (Muar).
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> The court was invited to assume that the aforesaid officers were indeed the Officers in Charge of the places of detention. In Wong Kiew Meow, Abdul Aziz bin Mohamed J, accepted that the officer concerned (Noorbahri) must be the officer in charge of the place of detention, as it was explained by Noorbahri that he was the director and as well as the highest ranking officer at the place of detention. But there is no such or other material in the present cases for to assume or to infer that any of the officers concerned was the officer in charge of the place of detention. What is in evidence is the rank of the officers concerned, which only reveals the position of grade of those officers in the uniform service but not their position of responsibility at the place of detention. In short, there is no evidence that it was the officer in charge of the place of detention, although that was mandated by law, who

reminded the Applicants of their rights under r 3(2) and who forwarded the representation of the Applicants to the Advisory Board. In the absence of that evidence, it would not be reasonable to hold that the Respondents had complied with all procedural requirements. Rather, it must be held that there was a failure in procedure which warrants the Applicants to be set free.

[4] The detainee was accordingly released. The learned Judge had erred in law in proceeding on the basis that the failure to establish that Sazali bin Ismail, who carried out the functions under r 3(2), (3) and (4), was the officer in charge is fatal without a consideration of the nature and effect of the breach. This appeal is by the Respondents.

[5] At the hearing of the appeal before us, the learned Deputy Public Prosecutor argued that the mandatory requirements of r 3(2), (3) and (4) have been complied with. The detainee had been informed of his right to make representations and that the written representation in Form I had been forwarded to the Advisory Board. He then referred to the case of *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28 and said that the requirement for these functions to be carried out by the officer in charge is only directory and non-compliance with it is not fatal. In his reply, learned counsel referred to the case of *Abdul Ghani bin Jusoh & Anor v Public Prosecutor* [1981] 1 MLJ 25 and said that where a duty is prescribed to be performed by a named officer then it should be carried out only by him. As such, he said, a breach of that requirement is fatal without the need to show prejudice.

[6] The objection taken by learned counsel in the High Court and before us is that there is no evidence to show that Sazali bin Ismail who carried out the duties specified in r 3(2), (3) and (4) was the officer in charge of Pusat Pemulihan Akhlak, Muar, Johor as he had only described himself as a superintendent of that place. Such a description is certainly insufficient to show that he was the officer in charge. The fact that the duty to carry out the functions in the rules is entrusted to the officer in charge is no doubt of importance. The purpose is to ensure that they are carried out properly and promptly. However, there is no qualification in r 3(2), (3) and (4) requiring the officer in charge to carry out the duties personally. This brings into focus s 7 of the Interpretation Acts 1948 and 1967 ('s 7') which reads as follows:

A reference to the holder of any public or other office (including a reference in an appointment made pursuant to section 50) is a reference to the person for the time being lawfully holding, acting in or exercising the functions of that office.

[7] Thus the rules, as they stand, read with s 7 mean that the functions of the officer in charge can also be carried out by someone who is lawfully exercising the functions of that office. It follows that a reference to the officer in charge in r 3(2), (3) and (4) includes a person who is lawfully exercising the functions of that office. Needless to say, where the functions are carried out by someone else he must tender in evidence his right to act in that capacity. A failure to do so will no doubt lead to a breach of the requirements of r 3(2), (3) and (4). In this case, there is no evidence

to show that Sazali bin Ismail was the person lawfully holding, acting in or exercising the functions of the officer in charge. There is therefore a breach of r 3(2), (3) and (4) to that extent.

[8] The resultant matter for consideration is whether the breach is subject to judicial review. A right to judicial review when there is a breach of a procedural requirement in the making of a detention order under the Act was considered by this court in *Muhammad Jailani bin Kasim v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403 in the following words:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 28; *Low Teng Hai v Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v Inspector General of Police* [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the court to intervene is limited to only matters of compliance with procedural requirements by s 11C(1) of the Act which reads as follows:
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> > There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
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> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

[9] It must be observed that the significant parts of r 3(2), (3) and (4) are a reminder to the detainee of the right to make representation and the receipt and forwarding of Form I to the Secretary of the Advisory Board. Non-compliance with these aspects of the rules will affect the right of representation of the detainee. Thus, any breach in the matters to be communicated to the detainee will affect the hearing before the Advisory Board. This will in turn have a direct bearing on the recommendation to be made to the Yang di-Pertuan Agong by the Advisory Board. Thus, it can only mean that the more crucial aspect of r 3(2), (3) and (4) is the performance of the duties required by the rules. That, however, cannot be said of the

person who is required to communicate the information to the detainee. The fact that it has been done by a person who is not the officer in charge will have no bearing on the conduct of the hearing by the Advisory Board. In this regard, reference may be made to *Howard v Bodington* (1876) 2 PD 203 where Lord Penzance said at p 211:

> There may be many provisions in Acts of Parliament which although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end.

[10] In *District Board Kheri v Abdul Majid Khan* AIR 1930 Oudh 434, it was held that where the prescription of an Act relates to the performance of a duty by a public officer the breach of such prescription when it does not cause any real injustice does not invalidate the act done under the Act and therefore such prescriptions are merely directory. This is particularly so in this case as there is no requirement that the communication must be made by the officer in charge personally. After all s 9(2) of the Act only provides that for the purpose of enabling a person to make representation he shall be informed of that right. It does not say that the communication must be made by any specified officer. It follows that the fact that the requirements of r 3(2), (3) and (4) were performed by a person who is not the officer in charge does not invalidate the act done.

[11] Thus, the fact that the duties specified in r 3(2), (3) and (4) have not been carried out by the officer in charge, though a breach, does not affect the hearing before the Advisory Board and, consequently, is not one that will govern the exercise of discretion by the Yang di-Pertuan Agong in making a decision on the recommendation of the Advisory Board. It is therefore not one that is subject to judicial review within the meaning of s 11C of the Act.

[12] Accordingly, we allow the appeal.

Appeal allowed.

Reported by John Paul Simon